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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID STEPHEN THOMAS,

Defendant and Appellant.

G031204

(Super. Ct. No. 02CF0470)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steven T. Oetting and Heather F. Wells, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

A superior court jury convicted defendant David Stephen Thomas of the felony of attempting to dissuade a witness and a string of misdemeanor charges, all of which arose from an incident on or about January 2, 2002. Defendant appeals the judgment for this set of offenses, for which the court placed him on felony probation for five years.

During trial, the prosecution sought to admit Detective Robert Valdez's testimony about statements made to him by defendant's six-year-old daughter A. on the evening of January 2. During an Evidence Code section 402 hearing, Detective Valdez testified A. told him defendant (1) stormed into the bedroom where she and her mother were sleeping, (2) was angry her mother had not prepared food for him, (3) yelled at her mother, and (4) struck her mother in the chest area with his hand. The court allowed Detective Valdez to testify at trial, over defendant's objection, pursuant to the spontaneous declaration exception to the hearsay rule contained in Evidence Code section 1240.

Defendant contends the trial court erred by admitting Detective Valdez's testimony regarding A.'s statements because A. was not under the stress of excitement as a result of the incident when she made the statements and because Detective Valdez could not remember the exact words A. used.

We affirm. Substantial evidence supports the trial court's finding that when A. spoke to Detective Valdez, she was under the stress of excitement as a result of the incident. Evidence Code section 1240 does not require a witness to remember verbatim the declarant's words for the statements to be admissible under the spontaneous declaration exception. Therefore, the trial court did not abuse its discretion by admitting Detective Valdez's testimony.

## BACKGROUND

We view the evidence in the light most favorable to the judgment of conviction and resolve all conflicts in its favor. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *In re Roark* (1996) 48 Cal.App.4th 1946, 1948, fn. 3.)

In January 2002, 41-year-old defendant, his wife of 17 years, Petrina Thomas,<sup>1</sup> and their six-year-old daughter A. were living with defendant's parents at his parents' house. On January 2, Petrina left work at 3:00 p.m. and drove home after she was unable to reach defendant by telephone. When she arrived at the house, she did not see defendant's car and did not find him inside the house. Petrina then drove around the corner to defendant's friend's house. Petrina pulled up to the house and honked her horn. Defendant, who had been drinking alcohol, got up and staggered out of the garage to the car. He told Petrina not to worry because he had already called work and said he would be in around 8:00 p.m. Petrina responded, "You know you have to go to work. Why are you like this?" Defendant told her not to worry and said he would go back to his parents' house with her.

After defendant and Petrina entered defendant's parents' house, defendant followed Petrina into the bathroom and told her he hated her, did not love her, and she needed to go back to Missouri. Petrina told defendant she and A. would go. Defendant said, "You're not taking my daughter anywhere." Petrina replied, "I guess I'll have to be dead. I'm not leaving her here with you." Petrina, upset, drove back to work. Petrina arrived back at work around 6:00 p.m. and stayed there until shortly after 9:00 p.m.

When Petrina arrived home shortly before 10:00 p.m., she saw defendant's car and concluded he had not gone to work. She found defendant asleep, lying face down on the bed in the back bedroom. Defendant was snoring loudly. Petrina could smell alcohol. A little after 10:00 p.m., Petrina changed her clothes, went into the spare

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<sup>1</sup> We refer to Petrina Thomas by her first name for ease of reference, and intend no disrespect.

bedroom where A. was sleeping, got into bed with A., and went to sleep. Petrina testified that shortly thereafter, she felt a whack on her leg and heard someone say, “where the fuck is my food.” Petrina and A. jumped. Petrina told A. to get out of the room because she did not want A. to hear any bad words or witness a confrontation. A. left the room within a minute of the beginning of the dispute.

Defendant repeatedly asked, “where’s my food?” and said, “I got to go to work.” Petrina told him that it was 10:00 o’clock at night and refused to fix food for him. She told defendant she had to go back to bed because she had to go to work the next day. Defendant left the room and returned with a box cutter with the blade partially exposed. Defendant held the box cutter to Petrina’s throat. Petrina said, “If you want, you can go ahead [and] kill me. It doesn’t matter.” Defendant replied, “I won’t kill you. I’m not going to jail.” He took the box cutter away from her throat and said, “I know how to get you.” Defendant walked to the back bedroom and started slashing some of Petrina’s clothes with the box cutter.

Petrina, who had followed defendant to the back bedroom, grabbed the phone and dialed 911. Defendant “snatched” the phone from Petrina before the 911 operator picked up, causing the phone cord to come out of the wall. Petrina thought he had broken the phone, so she went into the next bedroom. Defendant’s parents told defendant to get out of the house. Defendant left. Petrina observed defendant outside, bending down beside her car; he appeared to be slashing the tires.

Petrina dialed 911 and told the operator defendant had slapped her around and verbally threatened her. Officer Douglas McGeachy and Detective Robert Valdez were dispatched to the house and arrived within four minutes of Petrina’s call. Officer McGeachy spoke with Petrina, and Detective Valdez talked with A.

Detective Valdez found A. in her grandparents’ bedroom. He testified he spoke with A. approximately 10 minutes after he was dispatched to the house. A. appeared distraught and refused to make eye contact with Detective Valdez. After

Detective Valdez tried to make A. more comfortable by initially engaging in casual conversation, A. told him that she observed her father storm into the bedroom and yell at her mother. A. told Detective Valdez she saw her father strike her mother in the chest area with his hand and that her father was upset because her mother did not have any food ready for him.

A few hours after the incident, Petrina obtained a restraining order which prohibited defendant from being in contact with Petrina or A. Defendant returned to the house later that night and got into bed with Petrina while she pretended to be asleep. Defendant's mother came into the bedroom and told defendant to get out.

Petrina had previously obtained a restraining order against defendant as a result of an incident that occurred six months earlier. In June 2001, after getting into an argument, defendant pushed Petrina into a pool even though he knew she could not swim. Petrina "started going under" and kicked her way back up. Defendant yelled, "Now you see what it feels like. What I've had to go through. Now I'm in control. You've had all this control for all these years." After Petrina grasped and kicked her way to the edge of the pool, defendant pushed her back in toward the deep end of the pool. Defendant said, "[T]hings are going to be my way." Petrina responded, "Whatever you want. Just please let me out." When Petrina was again at the edge of the pool, defendant again pushed her back in. Petrina managed to get to the steps of the pool and defendant took her hand and pulled her up.

Defendant was arrested after this incident and signed a guilty plea form stating, "I willfully, unlawfully assaulted Petrina Thomas with force likely to cause great bodily injury, and committed a battery against her while she was my spouse, by pushing her in the deep end of a pool when I knew she could not swim, and I kept pushing her." Petrina obtained a restraining order which was modified to prohibit defendant from harassing, threatening, or committing violence upon Petrina.

In connection with the January 2, 2002 incident, defendant was charged in a seven-count information alleging he committed the following offenses: (1) felony criminal threats (Pen. Code, § 422); (2) assault with a deadly weapon (*id.*, § 245, subd. (a)(1)); (3) attempt to dissuade a witness (*id.*, § 136.1, subd. (b)(1)); (4) misdemeanor child abuse, neglect or endangerment (*id.*, § 273a, subd. (b)); (5) violation of a protective order (*id.*, § 273.6, subd. (a)); (6) misdemeanor battery against spouse, cohabitant, parent of defendant's child, non-cohabiting former spouse, fiancée or other person (*id.*, § 243, subd. (e)(1)); and (7) misdemeanor vandalism in an amount under \$400 (*id.*, § 594, subd. (a)).

During trial, the court held an Evidence Code section 402 hearing to determine whether statements made by A. to Detective Valdez were admissible under the spontaneous declaration exception to the hearsay rule under section 1240. (All further statutory references are to the Evidence Code.) The trial court concluded Detective Valdez's testimony regarding A.'s statements was admissible under section 1240.

The jury found defendant not guilty of making criminal threats (count 1), assault with a deadly weapon (count 2), and misdemeanor child abuse, neglect or endangerment (count 4). The jury found defendant guilty of misdemeanor assault (a lesser included offense of count 2), attempting to dissuade a witness (count 3), violation of a protective order (count 5), misdemeanor spousal battery (count 6), and misdemeanor vandalism (count 7).

## DISCUSSION

### *I.*

#### *APPLICABLE LEGAL PRINCIPLES AND STANDARD OF REVIEW*

The hearsay rule generally prohibits the admission of "evidence of a statement that was made other than by a witness while testifying at the hearing" and that is "offered to prove the truth of the matter stated." (§ 1200.) But "[e]vidence of a

statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.” (§ 1240.)

A spontaneous declaration “is considered to be inherently trustworthy under the rationale that certain events are so startling they produce a suspension of an observer’s powers of reflection. Therefore, a statement made spontaneously by that observer, while still under the stress of excitement and before there has been an opportunity to reflect or deliberate, will be an accurate and uncontrived description of the event observed.” (*People v. Jones* (1984) 155 Cal.App.3d 653, 660.) ““The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance – how long it was made after the startling incident and whether the speaker blurted it out, for example – may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.”” (*People v. Roybal* (1998) 19 Cal.4th 481, 516, italics added.)

The trial court’s factual determinations regarding the applicability of the spontaneous declaration exception will be upheld if supported by substantial evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 540-541; *People v. Phillips* (2000) 22 Cal.4th 226, 236; see *People v. Jones, supra*, 155 Cal.App.3d at p. 660.) “We review for abuse of discretion the ultimate decision whether to admit the evidence.” (*People v. Phillips, supra*, 22 Cal.4th at p. 236.)

## II.

### *SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT A. 'S STATEMENTS WERE MADE SPONTANEOUSLY WHILE UNDER THE STRESS OF EXCITEMENT CAUSED BY THE INCIDENT.*

Defendant contends the evidence showed A.'s statements to Detective Valdez were not spontaneously made while A. was under the stress of excitement caused by the incident and thus were improperly admitted under the spontaneous declaration exception to the hearsay rule.

In finding Detective Valdez's testimony regarding A.'s statements admissible under section 1240, the trial court stated, "What we have here is a young girl who had witnessed an unusual event, an exciting event. Ten minutes later, she's laying down feigning sleep. Her demeanor is more than what you described, [deputy public defender]. She was quiet, distraught. She avoided eye contact. She clung to her grandmother. She appeared upset. She was distraught, hesitant. And it's significant to this court that her demeanor changes significantly once the discussion goes from the casual part, where apparently she opened up and was able to converse as a normal six year old girl would, to the discussion of what transpired. She flipped back to the way she was when the officer first showed up. [¶] So it seems to me that in terms of trustworthiness, there is no suggestion that this little girl was coached, had time to reflect and make up anything. Well, the time was there, obviously you could make up stuff in 10 minutes, but there is no suggestion that she did so."

The trial court's finding that A.'s statements were made spontaneously while she was under the stress of excitement caused by the incident was supported by substantial evidence. During the section 402 hearing, Detective Valdez testified he spoke with A. at 10:30 p.m. – approximately 10 minutes after he was dispatched to defendant's parents' house on January 2, 2002. He found A. in her grandparents' bedroom lying down on the bed and acting as if she were asleep. Her grandparents asked A. to talk to

the police about what had happened that night. A. then appeared to Detective Valdez to not have been asleep but “was avoiding conversation with the police.” She appeared distraught, upset, very soft spoken, hesitant, quiet, and humble. Clinging to her grandmother, A. did not make eye contact with Detective Valdez and avoided talking to him and answering his questions. Detective Valdez tried to make A. more comfortable by having her sit on the bed with her grandmother right next to her. Detective Valdez sat down on the floor where he could be at eye level with A. and engaged in casual conversation with her for about five minutes before asking her about what had happened. He asked A. what grade she was in, about her hobbies, about television programs, how school was, and whether she had a lot of friends. A. was able to respond appropriately to his questions.

Detective Valdez also asked A. whether or not she knew the difference between a truth and a lie, and A. responded that she did know the difference. He asked A. whether it would be a truth or a lie if he were to tell her that his uniform was red. A. correctly answered that such a statement would be a lie. He asked her whether she knew the difference between right and wrong and what she would do if she found some money or property at school, which might belong to another person. A. said she would turn it in and turning it in would be right and not turning it in would be wrong.

During the time Detective Valdez engaged in casual conversation with A., her demeanor changed. She made eye contact with Detective Valdez and appeared to be more articulate and social.

When Detective Valdez began to ask A. questions about the incident, A.’s demeanor returned to how it was when he initially spoke with her. She put her head down, avoided eye contact, and became hesitant in answering questions. A. appeared nervous and scared, but was not crying. Detective Valdez testified A. told him “she observed her father storm into the room” and begin yelling at her mother, and “physically assault her mother striking her in the chest area” with his hand. A. told him that “her

father was upset over her mother not having food ready for him.” A. told Detective Valdez that upon seeing defendant strike her mother, she immediately ran out of the room and went to her grandparents’ room.

Defendant argues the evidence showed A. was not in an excited state because she was quiet, did not cry, and even appeared to be sleeping when first contacted by Officer Valdez. But Detective Valdez testified at the hearing that A. appeared distraught, nervous, and upset. He testified he believed A. was pretending to be asleep to avoid speaking with him. In any event, “[t]hough the declarations were made in a calm manner, this does not necessarily indicate a lack of spontaneity.” (*People v. Francis* (1982) 129 Cal.App.3d 241, 254.)

Defendant contends the evidence supported only a finding that A. was nervous about speaking with a police officer and not that A. was still under the stress of excitement caused by the incident itself. But, the trial court noted, A.’s demeanor changed from the time she engaged in casual conversation with Detective Valdez to when he began to ask her about the incident. At that time, she withdrew, avoided eye contact with him, and became hesitant in answering questions. A.’s hesitance under the circumstances indicated a reluctance to discuss the incident that upset her, as opposed to an effort to reflect on what the answers to Detective Valdez’s questions should be. A.’s statements were not inadmissible because they were obtained through questioning. (*People v. Brown, supra*, 31 Cal.4th 518, 541 [““Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*””]; *People v. Roybal, supra*, 19 Cal.4th 481, 516 [“The transcript of the recordings reveals that although [the witness] responded to several questions posed to him . . . , his statements, in the immediate aftermath of finding his wife’s body, could reasonably have been taken to represent his spontaneous reactions to the discovery”].)

Citing *People v. Trimble* (1992) 5 Cal.App.4th 1225, defendant argues “[i]f A[.] made any spontaneous statements, she made the[m] to her grandparents when she first went into their bedroom.” *People v. Trimble* is inapposite. In that case, a two-and-one-half-year-old child’s statements to her aunt, describing the murder of the child’s mother, were admitted as spontaneous declarations even though two days had passed since the murder occurred. (*Id.* at pp. 1234-1235.) The court explained that the child had been sequestered in a cabin with her brother and father during that time, and upon her first opportunity to speak with her aunt alone, she “became hysterical and commenced her frantic description of the assault.” (*Id.* at p. 1235.) Here, Detective Valdez spoke with A. within minutes of the incident and, as discussed above, while A. was still under the stress of excitement from it. It does not matter that A. had the opportunity to tell her grandparents what she had observed before she spoke with Detective Valdez.

We therefore conclude substantial evidence supports the trial court’s finding that A.’s statements to Detective Valdez were spontaneous declarations made while A. was under the stress of excitement caused by the incident.

### *III.*

#### *THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING DETECTIVE VALDEZ’S TESTIMONY REGARDING A.’S STATEMENTS EVEN THOUGH HE COULD NOT REMEMBER A.’S EXACT WORDS.*

Defendant contends Detective Valdez’s testimony regarding A.’s statements did not fall within the spontaneous declaration exception because Detective Valdez admitted at the section 402 hearing he could not remember the exact words A. used when she described the incident. Thus, defendant argues, the statements did not “narrate, describe, or explain” the incident observed by A., but constitute Detective Valdez’s “reflected interpretation of what the child said.”

Detective Valdez testified A. told him she observed defendant, angry that her mother had not prepared any food for him, storm into the bedroom where A. and her mother had been sleeping, yell at her mother and strike her in the chest with his hand. Section 1240 does not require a witness testifying about another's spontaneous declaration to remember the exact words of the declarant. Instead, Detective Valdez's degree of certainty regarding A.'s statements bears on his credibility and the weight the finder of fact should give his testimony. Detective Valdez's testimony about what he remembered A. told him, even though not in the exact words, reflected A.'s description of the incident which she observed, within the meaning of section 1240. Therefore, the trial court did not abuse its discretion in admitting this testimony.

#### DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.